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v.

BAR MALAYSIA

B

COURT OF APPEAL, PUTRAJAYA
HISHAMUDIN MOHD YUNUS JCA
ZAHARAH IBRAHIM JCA
AZAHAR MOHAMAD JCA
[CIVIL APPEAL NO: W-02(NCVC)(W)-475-02-2012]

C

31 JULY 2013

LEGAL PROFESSION: *Malaysian Bar - Object and powers of Bar Council - Appellant provided service of connecting general public to firms providing legal assistance - Service advertised - Whether company's acts*

D

contravened provisions of Legal Profession Act 1976 - Application for interlocutory and quia timet injunction against company - Whether Bar Council had locus standi to commence action and apply for injunction - Legal Profession Act 1976, ss. 37, 41, 42, 47 & 57

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CIVIL PROCEDURE: *Injunction - Appeal against - High Court granted interlocutory and quia timet injunction against appellant which provided advertising service of connecting general public to firms providing legal assistance - Nature of action - Whether civil proceeding or criminal prosecution - Whether powers of Attorney General as Public Prosecutor*

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usurped - Whether Bar Council had locus standi to commence action and apply for injunction - Legal Profession Act 1976, ss. 37, 41, 42, 47 & 57

The appellant wished to launch a service to the general public who were seeking legal assistance by providing information on law

G

firms providing such assistance and connecting the requesting party to the appropriate law firms ('the impugned service'). The appellant had approached several legal firms to enquire about their services and the terms of their services and in addition to that, advertised the impugned service *via* the internet and e-mail.

H

However, the appellant made it clear that it did not itself provide any legal service. Having the view that the appellant's acts contravened the Legal Profession Act 1976 ('the LPA'), the respondent sought and obtained from the High Court an interlocutory and *quia timet* injunction against the appellant on the

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ground that it had a duty to protect public interest. In the High Court, the appellant submitted that the respondent lacked the

necessary substantive *locus standi* to commence the action against the appellant as the act sought to be restrained by the injunction constituted a criminal act which only the Attorney General had the power to deal with by way of prosecution, as prescribed under art. 145 of the Federal Constitution. The High Court judge held, *inter alia*, that (i) the respondent had the substantive *locus standi* as s. 42 of the LPA provided the Malaysian Bar with extensive objects and powers to commence the action and apply for injunction; and (ii) the respondent was not usurping the powers of the Attorney General as this was not a criminal prosecution, but was an action necessary to protect the general public. Hence, the present appeal against the order granting such injunction. The issue that arose for consideration was whether the respondent had the substantive *locus standi* to apply for the said injunction.

Held (allowing appeal; setting aside order of High Court)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

(1) The respondent did not have the substantive *locus standi* to apply for the injunction. Any infringement of s. 37 of the LPA is penal in nature and such infringement is within the sole purview of the Attorney General as the Public Prosecutor. It was not part of the respondent's affairs. (paras 32 & 33)

(2) The respondent being a corporate body, must necessarily act through some functionary of representative. That functionary or representative is the Bar Council which is established under s. 47 of the LPA for the specific purpose of the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions under the LPA. (para 27)

(3) The powers in paras (a) to (d) of s. 42(2) of the LPA does not enable the respondent to institute this action to restrain the appellant from providing the impugned service. The powers of the respondent in ss. 41(2) and 42(2) of the LPA must be read together with the powers of the Bar Council in s. 57 of the same Act. It would then be apparent that the respondent's powers to institute legal proceedings through the Bar Council are limited to matters concerning the affairs of the Malaysian Bar. (paras 24 & 30)

Bahasa Malaysia *Translation Of Headnotes*

Perayu berniat untuk melancarkan perkhidmatan kepada masyarakat awam yang ingin mendapatkan bantuan guaman, dengan membekalkan maklumat mengenai firma-firma guaman yang menyediakan bantuan sedemikian dan menghubungkan pihak yang berkenaan kepada firma-firma guaman yang sepatutnya ('perkhidmatan yang dipertikaikan'). Perayu telah berjumpa dengan beberapa firma guaman untuk bertanya mengenai perkhidmatan mereka dan terma-terma perkhidmatan mereka dan ditambah lagi, mengiklankan perkhidmatan yang dipertikaikan melalui internet dan e-mel. Walau bagaimanapun, perayu telah menjelaskan bahawa ia sendiri tidak memberikan sebarang khidmat guaman. Berpendapat bahawa tindakan-tindakan perayu bercanggah dengan Akta Profesion Undang-Undang 1976 ('APU'), responden memohon dan berjaya mendapatkan injunksi interlokutori dan *quia timet* daripada Mahkamah Tinggi terhadap perayu, atas alasan bahawa ia mempunyai tanggungjawab untuk melindungi kepentingan awam. Di Mahkamah Tinggi, perayu menghujahkan bahawa responden tidak mempunyai *locus standi* substantif yang diperlukan untuk memulakan tindakan terhadap perayu kerana tindakan yang ingin disekat oleh injunksi membentuk satu tindakan jenayah yang mana hanya Peguam Negara mempunyai kuasa untuk berurusan dengannya melalui pendakwaan, seperti diperuntukkan di bawah fasal 145 Perlembagaan Persekutuan. Hakim Mahkamah Tinggi memutuskan, antara lain, bahawa (i) responden mempunyai *locus standi* substantif yang diperlukan kerana s. 42 APU memperuntukkan bahawa Malaysian Bar dengan objek-objek dan kuasa-kuasa menyeluruh untuk memulakan tindakan dan memohon injunksi; dan (ii) responden tidak merampas kuasa Peguam Negara kerana ini bukanlah pendakwaan jenayah tetapi sebaliknya satu tindakan yang diperlukan untuk melindungi masyarakat awam. Maka, rayuan terhadap perintah yang membenarkan injunksi sebegitu. Isu yang timbul untuk pertimbangan adalah sama ada responden mempunyai *locus standi* substantif untuk memohon injunksi tersebut.

Diputuskan (memohon rayuan; mengenepikan perintah Mahkamah Tinggi)

Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Responden tidak mempunyai *locus standi* substantif untuk memohon injunksi. Sebarang pelanggaran s. 37 APU adalah bersifat penal dan pelanggaran sebegitu adalah dalam skop khas Peguam Negara sebagai Pendakwa Raya. Ia bukanlah sebahagian daripada urusan responden.

(2) Responden, sebagai badan korporat, semestinya bertindak melalui wakil petugas. Petugas atau wakil ialah Majlis Peguam yang ditubuhkan di bawah s. 47 APU bagi tujuan khas pengurusan teratur urusan-urusan Majlis Peguam dan pelaksanaan wajar fungsi-fungsinya di bawah APU.

(3) Kuasa-kuasa di bawah perenggan (a) hingga (d) s. 42(2) APU tidak membenarkan responden memulakan tindakan ini untuk menyekat perayu daripada menyediakan perkhidmatan yang dipertikaikan. Kuasa-kuasa responden di bawah ss. 41(2) dan 42(2) APU mesti dibaca bersama-sama dengan kuasa-kuasa Majlis Peguam di bawah s. 57 Akta yang sama. Ia akan kelihatan jelas bahawa kuasa-kuasa responden untuk memulakan prosiding undang-undang melalui Majlis Peguam terhad kepada perkara-perkara berkenaan urusan Badan Peguam Malaysia.

Case(s) referred to:

American Cyanamid Co v. Ethicon Ltd [1975] AC 396 ***(refd)***

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors [1995] 1 CLJ 293 CA ***(refd)***

Legislation referred to:

Federal Constitution, art. 145

Legal Profession Act 1976, ss. 37(3), 41(2), 42(1)(g), (2)(a), (b), (c), (d), (e), 43(3), 47, 56, 57(j)

For the appellant - Mahathir Abdullah (Adlan Hadi Mohamed Yusof with him); M/s Raslan Loong

For the respondent - Trevor George (Izalia Zainuddin with him); M/s Trevor George Partnership

Reported by Najib Tamby

JUDGMENT

Zaharah Ibrahim JCA:

Background Facts

[1] The appellant is a private limited company incorporated under the Companies Act 1965.

[2] The respondent is a body corporate established by the Legal Profession Act 1976 ('the LPA').

[3] The appellant wishes to launch a service to members of the public who are seeking legal assistance by providing information on law firms providing such assistance, and connecting the requesting party to the appropriate law firms ("the impugned service").

[4] To that end, the appellant has been approaching several legal firms to inquire about their services and the terms of the services. The appellant has also advertised the impugned service on the internet and by e-mail, but has made it clear that it does not itself provide any legal service.

[5] The respondent, having taken the view that the appellant's acts contravene the LPA, sought and obtained from the High Court an interlocutory and *quia timet* injunction against the appellant on the ground that it has a duty to protect public interest.

[6] The appeal before us is against the order granting such injunction.

High Court Decision

Substantive Locus Standi

[7] In the High Court, apart from the issue of whether the usual tests as propounded in *American Cyanamid Co v. Ethicon Ltd* [1975] AC 396, [1975] 1 All ER 504, and developed further in *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & Ors* [1995] 1 CLJ 293 ("*Keet Gerald* tests"), had been met, the appellant had raised the issue of whether the respondent had the substantive *locus standi* to commence this action against the appellant.

[8] The appellant submitted that the respondent lacked the necessary substantive *locus standi* in view of the fact that the act sought to be restrained by the injunction constitutes a criminal act which only the Attorney General, under art. 145 of the Federal Constitution, has the power to deal with by way of prosecution.

[9] The learned High Court Judge found that the respondent had substantive *locus standi* as the LPA had provided for the Malaysian Bar, in s. 42, extensive objects and powers to commence the action and apply for the injunction.

[10] The learned High Court Judge held that the purpose in para. 42(1)(g) of the LPA was of particular relevance and would clothe the respondent with *locus standi* to bring this action for "the benefit and protection of an unsuspecting public". That paragraph reads as follows:

> (g) to protect and assist the public in all matters touching ancillary or incidental to the law;

[11] The learned High Court Judge was of the view that the respondent was not usurping the powers of the Attorney General in filing this action, as this was not a criminal prosecution, but an action brought due to the respondent's•belief that the action was necessary to protect the public in relation to the impugned service, which clearly fell within the phrase "matters touching ancillary or incidental to the law".

Keet Gerald Tests

[12] On the *Keet Gerald* tests, the learned High Court Judge found that:

(a) there was a *bona fide* issue to be tried, namely whether the impugned service was caught by s. 37(3) of the LPA;

(b) the balance of convenience lay in the respondent's favour as an "untold number of unsuspecting and gullible" members of the public would be taken in and be adversely affected as opposed to the financial loss and loss of goodwill that the appellant would suffer if the injunction was granted; and

(c) damages would not be adequate remedy as "if left unchecked" the impugned service "may well lead to dire consequences".

Issues During The Appeal

[13] The issue of substantive *locus standi* is the main issue before us during the hearing of this appeal.

[14] Encik Mahathir Abdullah, learned counsel for the appellant, submitted that civil proceedings cannot be invoked to prevent what is essentially a criminal act. The provision of the impugned service if it contravenes s. 37 of the LPA would be a criminal offence. The respondent should have referred the matter to the Attorney General.

[15] Encik Mahathir contended that the respondent is acting *ultra vires* the LPA in applying for the injunction.

[16] Encik Trevor George, learned counsel for the respondent, submitted that in raising the issue of *locus standi*, the appellant is actually saying that the learned High Court Judge must decide on the merits. At the interlocutory injunction stage, all the respondent needs to show is that the *Keet Gerald* tests have been satisfied.

[17] If the respondent has no *locus standi*, according to Encik Trevor George, the appellant should have applied to strike out the suit.

Analysis Of Issue

[18] It is not in dispute that the appellant's act that the respondent seeks to restrain is the provision of the impugned service. The respondent says that such act contravenes s. 37 of the LPA and by virtue of the respondent's objects and powers as set out in s. 42 of the LPA, in particular para. 42(1)(g), it is duty-bound to apply for the injunction to restrain the appellant from continuing with such act.

[19] We agree with the learned High Court Judge that whether or not the appellant's impugned service is an act prohibited by s. 37, in particular s. 37(3) of the LPA, is a matter that needs to be determined during the trial, not at the interim injunction stage.

[20] Our concern is simply whether the respondent has the substantive *locus standi* to apply for the injunction.

[21] To understand the scope of the objects and powers of the respondent, it is useful to set out in full the provisions of ss. 41 and 42 of the LPA. They read as follows:

> **Establishment of Malaysian Bar**
>
> 41(1) There is established a body corporate to be called the "Malaysian Bar".
>
> (2) The Malaysian Bar shall be a body corporate with perpetual succession and a common seal, and with power subject to this Act to sue and be sued in its corporate name and to acquire and dispose of property both movable and immovable and to do and perform such other acts as bodies corporate may by law perform.

Object and powers of the Bar

42(1) The purpose of the Malaysian Bar shall be:

(a) to uphold the cause of justice without regard to its own interests or that of its members, uninfluenced by fear or favour;

(b) to maintain and improve the standards of conduct and learning of the legal profession in Malaysia;

(c) to facilitate the acquisition of legal knowledge by members of the legal profession and others;

(d) where requested so to do, to express its view on matters affecting legislation and the administration and practice of the law in Malaysia;

(e) to represent, protect and assist members or of the legal profession in Malaysia and to promote in any proper manner the interests of the legal profession in Malaysia;

(f) to establish libraries and to acquire or rent premises to house the libraries and offices of the Malaysian Bar or amenities for the use of members either alone or in conjunction with any other body or society;

(g) to protect and assist the public in all matters touching ancillary or incidental to the law;

(h) to make provision for or assist in the promotion of a scheme whereby impecunious persons may be represented by advocates and solicitors;

(i) to award prizes and scholarships and to establish and subsidise lecturership in educational institutions in subjects of study relating to law;

(j) to grant pecuniary or other assistance to any association, institute, board or society in Malaysia in the interest of the legal profession or of the law students;

(k) to afford pecuniary and other assistance to members or former members of the Malaysian Bar and to the wives, widows, children and other dependants, whether of members, former members or deceased members who are in need of any such assistance;

(l) to promote good relations and social intercourse amongst members and between members and other persons concerned in the administration of law and justice in Malaysia;

(m) to encourage, establish and maintain good relations with professional bodies of the legal profession in other countries and to participate in the activities of any local or international association and become a member thereof; and

(n) to establish a Compensation Fund.

(2) In addition to any other powers given by this Act, the Malaysian Bar may:

(a) purchase or lease any land or building required for any of the purpose of the Malaysian Bar;

(b) sell, surrender, grant, lease, exchange or alter any land or building as may be found most convenient or advantageous;

(c) borrow money whether by way of bank overdraft or otherwise for such of the purposes of the Malaysian Bar as the Malaysian Bar may from time to time consider desirable;

(d) make rules governing the manner of convening general meetings of the Malaysian Bar and the procedure thereat which rules shall be approved and may be amended by ordinary resolution at a general meeting of the Malaysian Bar; and

(e) do all such other things as are incidental or conducive to the achievement or betterment of the purposes of the Malaysian Bar.

(3) In addition to any other rules that it may make under this Act the Malaysian Bar may make rules for giving effect to this Part.

[22] The specific power in s. 41(2) of the LPA for the respondent to sue and be sued in its corporate name comes with the qualification that it is "subject to this Act".

[23] The matters listed in s. 42(1) are not powers of the respondent but are the objects for its establishment. Its powers are as set out in ss. 41(2), 42(2) and 43(3) of the LPA.

[24] The powers in paras. (a) to (d) of s. 42(2) does not enable the respondent to institute this action to restrain the appellant from providing the impugned service.

[25] Section 41(2) and para. (e) of s. 42(2) at first blush seem to grant the respondent the power to make the application for injunction against the appellant.

[26] However, the provisions of ss. 41(2) and 42(2) must be read together with the rest of the LPA.

[27] It must be borne in mind that the respondent being a corporate body must necessarily act through some functionary or representative. That functionary/representative is the Bar Council which is established under s. 47 of the LPA for the specific purpose of "the proper management of the affairs of the Malaysian Bar and for the proper performance of its functions under this Act".

[28] Under s. 56 of the LPA, the management and funds of the respondent are vested in the Bar Council.

[29] Section 57 of the LPA, sets out the specific powers of the Bar Council. Of special relevance to the issue of substantive *locus standi* before us is para. 57(j), which reads as follows:

> (j) to institute, conduct, defend, compound or abandon any legal proceedings **by and against the Malaysian Bar** or its officers or otherwise **concerning the affairs of the Malaysian Bar** and to compound and allow time for payment or satisfaction of any debts due or of any claims or demands made by or against the Malaysian Bar. (emphasis added)

[30] In our view, the powers of the respondent in ss. 41(2) and 42(2) of the LPA must be read together with the powers of the Bar Council in s. 57. When that is done, it will be apparent that the powers of the respondent to institute legal proceedings (through the Bar Council) are limited to matters "concerning the affairs of the Malaysian Bar".

[31] Is the possible infringement of s. 37 of the LPA part of the affairs of the Malaysian Bar (the respondent)?

[32] As any infringement of s. 37 is penal in nature, we agree with the appellant that such infringement is within the sole purview of the Attorney General as Public Prosecutor. It is not part of the affairs of the respondent.

[33] We are therefore of the considered view that the respondent does not have the substantive *locus standi* to apply for the injunction which is the subject matter of this appeal.

[34] Based on our analysis and conclusion as set out above, we do not think it is necessary to deal with the *Keet Gerald* tests.

Decision

[35] We therefore allow this appeal and we set aside the order of the High Court. We also order that costs in the sum of RM10,000 be paid to the appellant.